

2012 WL 6048138 (Idaho) (Appellate Brief)  
Supreme Court of Idaho.

LIBERTY NORTHWEST INSURANCE CO., Individually and as Subrogee of Duane R.  
Grant and Douglas E. Grant d/b/a Grant 4-D Farms, Appellant/Cross-Respondent,

v.

SPUDNIK EQUIPMENT COMPANY, LLC, an Idaho limited liability company; and  
John Does I-Iv; and John Doe Corporations I-Iv, Respondent/Cross-Appellant.

No. 39957.  
November 15, 2012.

Appeal from the District Court of the Seventh Judicial District  
of the State of Idaho, in and for the County of Bingham  
Honorable Darren B. Simpson District Judge

**Brief of Respondent/cross-Appellant**

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## \*1 STATEMENT OF THE CASE

## Nature of the Case

Petitioner-Appellant and Cross-Respondent, Liberty Northwest Insurance Company (“Liberty Northwest Insurance” or the “insurance company”), appeals the district court’s order claiming the district court erred in granting summary judgment in favor of the Respondent and Cross-Appellant, Spudnik Equipment Company (“Spudnik Equipment”). Spudnik Equipment cross-appeals a prior order denying Spudnik Equipment’s motion to dismiss based on the insurance company’s failure to preserve evidence. The cross-appeal need only be addressed if the appellate court reverses the order granting summary judgment in favor of Spudnik Equipment.

## Statement of the Facts and Course of the Proceedings

The product liability claims at issue in this matter arise from an accident that occurred on October 9, 2008, at Grant 4-D Farms in Rupert, Idaho (also referred to as the “farm”). (R., pp.13-16.) Armando Olmos was a temporary (seasonal) employee for the farm. (R., pp. 191, 249.) On the day of the accident, Mr. Olmos was reconnecting conveyor tables used to move potatoes into

one of the farms potato cellars. (R., p.470-71.) Given his lack of training and experience and his advanced age and physical disability, it was not the kind of work that he should have been assigned. (R., p.220.) It appears Mr. Olmos was reconnecting the conveyor system when the system was powered on. (R., p.358.) Mr. Olmos caught his hand between the two conveyors and was seriously injured. (R., p.226.)

At the time of the accident, Mr. Olmos was 68 years old and severely hearing impaired. (R., pp.220.) According to his immediate supervisor, Mr. Olmos might have been \*2 mentally “slow.” (R., p.436.) Mr. Olmos had been living in California and came to Idaho to work when the farm was short on workers. (R., p.251.) It was his first time working a potato harvest and, as mentioned above, Mr. Olmos had missed the farm's pre-harvest training and safety meetings. (R., p.249.) At the time of the accident, it was late at night, it was late in the harvest, a bad storm was coming, and the supervisors were in a hurry to finish filling up the potato cellar. (R., pp.430, 190.) Grant 4-D Farms and Mr. Olmos' son plainly admit that Mr. Olmos should not have been working at the potato cellar and should not have been reconnecting the potato conveyors. (R., pp.220, 251.) The farm also admits that safety procedures were not followed and that if safety procedures had been followed Mr. Olmos would not have been injured. (R., p.237.)

Notwithstanding the farm's malfeasance, the farm's insurer, Liberty Northwest Insurance, brought a subrogation action against Spudnik Equipment. (R., pp.12-26.) The insurance company sought to recoup money paid to Mr. Olmos. (R., p.25.) The basis for the lawsuit was that the conveyor system was defective and unreasonably dangerous. (R., pp.12-26.) The insurance company conveniently ignored the farm's own admissions that the conveyor system was not defective or unreasonably dangerous or that it was a mistake for Mr. Olmos to be working on the conveyors.

The insurance company brought seven causes of action:

1. Negligent design and/or manufacture. Liberty Northwest Insurance asserted the “conveyor system is defective because when activated there is no way to predict which direction the conveyor belt(s) will spin, thereby placing the user in a dangerous situation.” (R., pp.15-17.)

\*3 2. Negligent failure to warn. Liberty Northwest Insurance claimed that Spudnik Equipment “failed to warn Mr. Olmos of the danger” associated with the “conveyor system” and that this failure to warn was the “direct and proximate cause” of Mr. Olmos' injuries. (R., pp.17-18.)

3. Strict liability-Defective product. Liberty Northwest Insurance asserts the same claim on the basis of strict liability as opposed to negligence. (R., pp.18-20.)

4. Strict liability-Failure to warn. Liberty Northwest Insurance asserts the claim, again, on the basis of strict liability as opposed to negligence. (R., pp.20-22.)

5. *Breach of implied warranty of fitness and/or merchantability.* Liberty Northwest Insurance claims there was an “implied warranty of fitness and/or merchantability” that was breached by Spudnik Equipment. (R., pp.22-23.)

6. *Breach of express warranty.* Liberty Northwest Insurance claims Spudnik Equipment “expressly warranted to the Subrogor Grant Farms that its Model 1205 conveyor system was safe, merchantable and fit for its intended purpose and use.” (R., pp.23-24.)

7. *Subrogation.* Liberty Northwest Insurance claims that Spudnik Equipment is liable for any amounts paid out as an insurer of Grant 4-D Farms. (R., pp.24-25.)

On September 20, 2010, Spudnik Equipment propounded its first set of discovery requests to the insurance company. Liberty Northwest Insurance's response to that written discovery request suggested two important facts. First, the insurance company

could identify, at best, only one component of the “conveyor system” it claimed was defective. (R., pp.201-204.) Second, the disclosures indicated that the equipment involved in the accident had not been preserved. (R., pp.202.)

**\*4** Following these disclosures, Spudnik Equipment immediately proceeded to depose key individuals at the farm. The depositions were telling. When asked why Grant 4-D Farms continued to use the equipment after the accident, Calvin Miller, an owner, testified that in his opinion the equipment was not defective:

Q. Do you know whether the equipment that was set up at the cellar on the day of the accident, whether or not it was - whether or not Grant Farms continued to use that equipment?

A. I can't--I don't know. But I imagine--I would say yes, we-- we'd continue.

Q. And why? What do you base that answer on?

A. Well, it would not be defective equipment. There would be no reason not to use it.

Q. Do you believe the conveyor was defective?

A. No.

(R., p.213 (p.37, Ls.9-20; p.39, Ls.19-21).) Mr. Miller also made clear that, in his opinion, Spudnik Equipment made good quality equipment and had a good reputation:

Q. What would you say Spudnik's reputation is--

A. Good.

Q. --within the community?

A. Good.

Q. Why would you say that?

A. They build quality equipment. It works good.

Q. And has your interaction with Spudnik been consistent with that reputation?

A. Yeah,...

**\*5** (R., p.209 (p.12, L.22 - p.13, L.5).)

Spudnik Equipment also deposed Mr. Saucedo, the supervisor in charge of running the conveyor system at the potato cellar when the accident happened. (R., p.436.) Prior to his deposition, Mr. Saucedo had given a statement to the insurance company's investigator regarding the accident. Mr. Saucedo explained that he believed Mr. Olmos was hard of hearing and mentally “slow.”

Q. “Geraldo tells me he thinks the claimant is hard of hearing.” Do you see that?

A. I do.

Q. He also told you that, "The claimant may be a little 'slow' (mentally)." Do you see that?

A. I do.

Q. Please tell me what he said.

A. He used the term "slow." I have "mentally" in parentheses because that's what I understood him to be saying to me.

(R., p.436 (p.82, Ls 8-10, 16-23).) At his deposition, Mr. Saucedo gave his version of the events. He stated that after he reconnected the conveyors he checked to make sure that everyone was away from the conveyors and told everyone that he was going to start the conveyors before he started any of the machinery. (R., p.226 (p.18, L.23 - p.19, L.25).) Mr. Saucedo also testified that he told Mr. Olmos he was going to re-start the system and that Mr. Olmos needed to go outside of the cellar to his work position. (R., p.226 (p.19, L.16 - p.20, L.2).) Mr. Saucedo also provided that he was walking out of the cellar with Mr. Olmos but for some reason, unbeknownst to Mr. Saucedo, Mr. Olmos returned to the cellar. \*6 (R., p.226 (p.19, Ls.18-22).) Mr. Saucedo denied knowing what Mr. Olmos was doing at the time he got his hand caught between the conveyors. (R., p.226 (p.26, Ls.20-22).)

Duane Grant, another owner of Grant 4-D Farms, in his deposition explained how the conveyor was powered up and what Mr. Saucedo told him regarding the events preceding the accident, including what Mr. Saucedo told him was the cause of the accident-Mr. Olmos' hearing impairment and Mr. Saucedo not checking to make sure everyone was clear from the conveyor system before starting it up:

A. ...The power supply for this cellar came from--either came from this cellar or from--there's another cellar located just to the south. And it may have come from this cellar.

But in either case, we weren't running a generator. In fact, we don't own a generator that's big enough to run this [conveyor] system. The power source would have come from the cellar-one of the cellars.

Q. I didn't mean to interrupt you. You were explaining to me what Mr.

A. Olmos or--

Q. Gerardo--

A. The start button - in fact, the electrical supply for the entire system is inside of a panel box mounted on the side of the clodhopper. The start button is on the front of that panel box.

And Gerardo [Saucedo, the manager and supervisor of the cellar] would have been stationed here when he pushed the button. Normal practice is for him to yell clear, look down the system, make sure everyone is clear, and push the button.

A. He told me he had called out clear. He had glanced down at the system. He thought everyone was clear. And he pushed the button. The buzzer sounded. And the system started.

So he-Gerardo told me that he yelled clear. He thought everyone was clear. He pushed the button. And either Mr. Olmos had re-approached the-at some point, re-approached the conveyor.

\*7 After the system started, one of these conveyors was running backwards; so that instead of a continuous conveyor of potatoes in, one of them was running backwards where the belts would have been running together.

Either Mr. Olmos had--was still at that point or he re-approached the conveyor after it started. But, any point, somehow he rested his hand on the belt and was pulled into the juncture between the two belts.

After it was discovered, Gerardo shut it down and they extracted him.

Q. This is what Gertado (sic)--

A. Gerardo. Think of Gerald with an O on the end of it.

Q. That was what he told you when you--

A. Yes. Yes. I should also, I guess, point out, Mr. Olmos was really hard of hearing and he's an older gentleman. Gerardo suspects that's what was going on, is he just didn't hear, and Gerardo didn't see him. But he's-- nobody is really sure.

Q. Mr. Olmos' testimony to the adjuster was that he was tightening the bolt that attaches the conveyors.

A. Uh-huh.

Q. And you're familiar with how that attaches?

A. Yes.

Q. And that while he was tightening, his other arm or hand was resting on the conveyor belt.

A. Yeah.

Q. Now, have you put conveyor together yourself?

A. Yes. Uh-huh.

Q. Is there any reason why you would put your hand on the inside of the conveyor to tighten?

\*8 A. I mean, there's no utility to having your hand on the inside of the conveyor belt, no. Bolts are on the outside. There's no reason to have your hand on the inside.

Q. Is having your hands or clothing in certain places, including on the conveyor belt, something that's discussed in your safety meetings?

A. Yes. Yes. Yeah. It's - there's a danger of getting clothing wrapped up in moving parts. It's one of the things we address in our safety meetings.

(R., p.235 (p.39, L.1 - p.47, L.5 (Emphasis added.).)

Significantly, Mr. Grant's deposition also confirmed what was alluded to in Liberty Northwest Insurance's discovery responses-- that the insurance company could identify only one of the conveyors involved in the accident:

Q. Is it possible, based on your records and based on the people that you have, to identify all the equipment that was present on the day of the accident?

A. So--

Q. Is that even possible?

A. The only way it would be possible--and it may be possible. But the only way it would be possible would be if the investigator that was sent by Liberty Northwest pulled serial numbers off of the pieces of equipment that were in this conveying system.

Q. But there's nobody at Grant 4-D Farms that could--

A. No.

Q. ---put together the accident scene?

A. These conveyors are completely interchangeable. We move them from cellar to cellar all the time.

\*9 (R., p.238 (p.51, Ls.13-23; p.52, Ls.9-15).) As a consequence, there was no way to track which equipment was allegedly involved because Liberty Northwest Insurance did not write down the serial numbers of the conveyors. The investigation report states:

The number "2721" is painted on the side of one of the tables that we know for sure was involved in the event. The Serial Number on this unit is: 877

The Model Number is 1205-96

(R., p.191.) And, Mr. Groat, the insurance company investigator confirmed that he did not identify the serial numbers on any of the other tables:

Q. Okay. Did you identify any serial numbers on any of the other tables?

A. I did not.

(R., p.427 (p.44, Ls.1-3).) And, even with the particular conveyor that was identified--that conveyor like all conveyors, was purchased used. (R., p.468 (p.25, Ls.16-19.)

Mr. Grant also confirmed that without being able to identify the specific equipment it would be impossible to determine the condition of the machines at the time of the accident because it was impossible to know what modifications and alterations had been performed on any of the equipment:

Q. ... At least in talking with the Spudnik people, when they manufacture a new conveyor, they manufacture it, in their words, "cellar specific," meaning that they wire it for a particular power source and for a particular cellar.

A. Uh-huh.

Q. Where you guys purchased the equipment used--

A. Uh-huh.

\*10 Q. --is that something that your shop, your maintenance people, do when you purchase a piece of used equipment? Do you make the equipment cellar specific?

A. Adapted. Our equipment is cellar nonspecific. We specifically set it up so that it is interchangeable. We run from four to five different cellar operations simultaneously. And we have our conveyors set up so that they can move seamlessly between any of the cellars. And that's regardless of whether they're Spudnik conveyors or Double L conveyors or STI conveyors.

Q. In your shop when you bring in a piece of used equipment, a used conveyor, do you have to make any modifications to the conveyor to make that possible?

A. Yes.

Q. I'm assuming that would mean reconfiguring some of the electrical work--

A.... let me kind of illustrate a couple of things that we have to do to make them interchangeable.

Spudnik builds--we own at least--at least two models of Spudnik conveyors. We may own more. I don't know. But I know we have at least two models. And the bolt connection patterns between those two models are not perfectly interchangeable. So we have modified them. And actually, we don't even use the Spudnik today. We don't use a Spudnik connection system. We have our own dowel and pin system that we use to hook our conveyors together. This is as of 2009. Okay.

Q. Okay.

A. In 2008, when this accident occurred, we were bolting the conveyors together still. But we would have to use spacers or different bolt sizes to get the different models to match up. So there are mechanical things that we've changed to make them interchangeable.

We've also--we have some Double L conveyors that we have remodified to have the Spudnik-style end on them so that they'll hook up to the Spudnik end. Actually, the Spudnik end is a much better design; so we've copied the Spudnik end and adapted that to the Double Ls.

Then electrically, we have the same--when you buy these conveyors, either directly from Spudnik, I would assume, definitely when you buy \*11 them on farm sales [which was allegedly the case here], *they can come with a wide range of different electrical connections on the end, depending on the amperage, the voltage, that a particular cellar - farmer is going to want for his cellar. You can buy them single phase, 220. You can buy them three-phase, 220. You can buy them three-phase, 480. You can buy them with some different iterations there as well and with different styles of plugs depending on the amperage that you're planning to go run through them.*

So we have adapted all of ours to have the same style plugs so that any conveyor - the male from any conveyor can fit the female on any other conveyor.

And then to accommodate--and this is an idea we actually got from Spudnik, I believe, to accommodate the unpredictability of which direction the motors will turn. Some of the conveyors that we bought had phase reversers on them. And we have added phase reversers onto every one of our conveyors so that we can interchange them and get the motors to run the right way without having to rewire the motors every time.

Prior to the phase reversers, we still had the issue with the conveyors running backwards. But to fix it, we'd have to take the plug apart and rewire the wires and put the plug back together, which is more dangerous and--

Q. And that was not something that was put on the conveyor by Spudnik. So that would have been something that was put on the conveyor by your shop?

A. Danny, I can't answer that. I'll tell you that we have installed phase reversers. Actually, I've had an electrician install them. My shop hasn't done it. I've had an electrician do that.

But some of the conveyors we bought had phase reversers on them already. That's actually where we got the idea, is some that we bought had them on them. Whether Spudnik installed them or a subsequent owner installed them, I can't answer that.

Q. If you purchase a used conveyor and you bring it in--

A. Uh-huh

**\*12** Q. --and it doesn't have one, would that be something that you modified and put on prior to harvest season?

A. Yes.

Q. ... Then that's standard practice whenever you buy used conveyors, is to bring them in and to, again, like we just said, make the cellar interchangeable?

A. Yes.

Q. Do you keep a record of that work as it applies to particular conveyors?

A. No.

Q. So there wouldn't be any way to tell whether or not those modifications were made to any of the conveyors that were at the cellar on the day of Mr. Olmos' accident?

A. I don't know of any way to tell, Danny. No.

(R., p.238-240 (p.52, L.17 - p.57, L.6) (Emphasis added.).) Mr. Miller, the other farm principal, agreed the equipment involved in the accident could not be identified. When asked whether the equipment could be identified, Mr. Miller answered: "...how would you know which conveyor? It would be difficult to pinpoint exact conveyors." (R., p.213 (p.37, Ls. 7-8).)

Mr. Grant and Mr. Miller also provided key information on the insurance company's warranty claims. Mr. Grant confirmed that when the farm bought used equipment they bought that equipment "as is," without warranty and that it was the farm that would accept the risk for "fitness" or "serviceability":

MR. PAPPAS:...The way Calvin [Miller] described it, Dennis called him about some of this equipment being available. And they both, he thought, went and looked at the equipment and later purchased it.

**\*13** I would assume that when you purchase equipment under such an arrangement, when the manufacturer has contacted you about some of the equipment available out there, it would be your understanding that the equipment you're going to purchase would be fit for its intended purpose; is that correct?

MR. BOWER: Objection. Calls for a legal conclusion.

THE WITNESS [Mr. Grant]: Matt, I'm probably gonna take a little bit of the other side on that, because -so Dennis sells equipment for Spudnik. But he also facilitates transactions between private parties. I know that we have bought equipment from other individuals that were just simply facilitated because of Dennis' exposure and knowledge of the marketplace and what's

available and so on. That's not unusual. We do the same thing with Phillip Rath, (phonetic) who is the Lockwood sales rep, as well as this gentleman that works with Double L that we do the same thing with.

So on our part, just because Dennis facilitates the deal, there's not an understanding that Spudnik corporate is standing behind the serviceability of the equipment. That's for us to determine when we make the deal.

MR. PAPPAS: Does that change things if all the paperwork and all the--

A. No. No, it doesn't. It doesn't. It's similar with Lockwood as well. We're the buyer. And it's up to us to determine the serviceability once we execute the deal.

I mean, there can be a situation where if we buy used equipment with a warranty, then it will be stated as such in the purchase document, and it will spell out what the warranty is: 30 days, 60 days, 90 days.

Sometimes we'll buy equipment with a provision that any parts that are required we get at cost or at a 30 percent discount or something like that.

So if it's used equipment and there is some kind of an obligation that's assumed by the vendor, whether it's Spudnik or Lockwood, it will be expressed in the documentation.

If it's new, obviously, then it has a new-equipment warranty. But in this case, I don't think there would have been. In this case, I also don't think the equipment ended up at Spudnik's yard. I think we went and picked it up at Steve Young's site.

\*14 (R., p.251 (p.69, L.12 - p.71, L.13).) Mr. Miller, who was involved in the transaction involving the one identified conveyor, also confirmed that the one identifiable conveyor was purchased "as is" and with no express warranties:

Q. Did you purchase--did you purchase the equipment as is?

A. Yes.

Q. Now, help me understand, you know, what as is means to you. What does that term mean to you?

A. The way they [the equipment] set--the way the--when I inspected them, as is, where is, as is.

Q. BY MR. BOWER: Again, focusing your attention on this particular transaction in the Spring of 2005 [when the one identified conveyor was sold], did Dennis make any warranties or representations to you regarding the fitness of the equipment?

A. No. No warranties, no.

(R., p.211 (p.19, Ls.15-17; p.22, Ls.15-18).)

Following the depositions of Mr. Grant, Mr. Miller and Mr. Saucedo, Spudnik Equipment deposed Mr. Israel Alvarez, Mr. Saucedo's manager, and Mr. George Olmos, Armando Olmos' son. Significantly, Mr. Olmos' son, George Olmos, testified that his father began working at Grant 4-D Farms after the potato harvest had begun and that he missed Grant 4-D Farms' pre-harvest training and safety meeting. (R., p.249 (p.40, L.11 - p.41, L.12).) George Olmos also confirmed that everybody at the farm, including Grant 4-D Farm supervisor "Nacho" believed that the accident resulted from his father's hearing impairment:

Q. So Nacho told you the problem was that somebody started the conveyor and your dad didn't hear?

A. That's what everybody said.

**\*15** Q. Who's "everybody"?

A. All the guys working in there.

Q. That's what Nacho told you?

A. Uh-huh.

(R., p.250 (p.56, Ls.8-15).) Certainly, having someone work on dangerous equipment without attending mandatory safety training is malfeasance and against industry safety standards. That malfeasance became even more apparent after the deposition of Mr. Alvarez. Mr. Alvarez was Mr. Saucedo's supervisor and admitted that it was a mistake for Mr. Olmos to be working near the conveyor tables.

Q. ...So what happens then when they shorten the conveyors? Are there people responsible for always reconnecting--

A. Helping? Yeah, he will always have a helper for that, a helper. It takes four or five guys.

Q. To do it?

A. Yeah, to do it. And usually, on the cellar, we have a--at least three good guys that work on irrigation.

Q. Because it's more dangerous and more complicated?

A. Yeah. You need to use your head a little more.

Q. Are these also the people that have been around the farm for a longer period of time?

A. Yes.

Q. So would these individuals know that the conveyors, when they start, can spin--

A. Yes.

Q. --the opposite directions?

**\*16** A. Yes. Those guys will know, yes.

Q. But if a person was working the harvest for the first time--

A. He wouldn't know anything.

Q. But the manager would know that?

A. Right.

Q. Would--

A. That's why the manager puts them in the safest place, which is on the picking table.

Q. Clod picking?

A. Clod picking table. Right there, it's safe for them. They shouldn't move from that place.

Q. As far as I know, this guy [Mr. Olmos] was inside and was supposed to be outside.

(R., p.221 (p.64, L.21 - p.67, L.17).) And, as conceded by Mr. Alvarez, it was a mistake to have someone like Mr. Olmos--a 68-year-old man that was hard of hearing--working on or near the conveyors:

Q. What about people that are hard of hearing? Are there any policies about hiring people that couldn't hear?

A. Not that I know of. I know there are rules about not hiring older people. We don't prefer to hire them.

Q. I see.

A. Yeah. So if you're referring to the people that work at the cellar, the manager of the cellar is the one that hires those people.

Q. Okay. So in the instance of Mr. Olmos, for example, he had a hard time hearing.

**\*17** A. Yes.

Q. Was it a mistake to have Mr. Olmos working on the equipment where the buzzer would indicate when the belts would start to begin?

MR. PAPPAS: I'll object to the extent it calls for a legal conclusion or speculation.

THE WITNESS: Well, I think it was, if you're asking my personal opinion.

Q. (BY MR. BOWER) I am.

A. I think it was.

(R., p.221 (p.57, L.19 - p.59, L.5).) George Olmos ultimately agreed with Mr. Alvarez's assessment:

Q. When you spoke with your dad about this, he never told you about hearing the buzzer from the piler, right?

A. Uh-huh.

Q. Is that yes?

A. Yeah.

Q. Okay. And so my question is, a person who can't hear very well, is he safe to be working on the conveyors?

A. Could you ask me that [again]?

Q. If your dad couldn't hear very well, do you still think it's safe for him to work on the conveyors?

A. Probably not.

(R., p.251 (p.71, L.12 - p.72, L.17).) In light of Mr. Alvarez's admissions and George Olmos' statements, it makes sense why this farm had never had such an accident:

Over that time, we've probably logged - we've logged thousands of hours of operation with hundreds of employees on these machines. And Mr. Olmos' injury was the first time that we had experienced an injury of this type.

**\*18** So my conclusion would be that reasonable operation-in reasonable operation, that the use of these conveyors is legitimate and reasonable. I mean, we continue to use these conveyors today, as do-as does everyone in the trade.

(R., p.234 (p.30, L.13 - p.31, L.11).)

In addition to concluding that the "conveyor system" was not unreasonably dangerous, Mr. Grant conceded that if the farm's safety guidelines had been followed, there would have been no accident:

Q. In your opinion, if the safety standards that were in place on the day of the accident were followed would have Mr. Olmos been injured?

A. If our safety standards, guidelines, and instructions were followed, Mr. Olmos would not have been in a position to be injured by the conveyor.

(R., p.237 (p.48, Ls.5-10).)

Following the depositions of Mr. Grant, Mr. Miller and Mr. Saucedo, Spudnik Equipment moved for dismissal on grounds that Liberty Northwest Insurance failed to fulfill its affirmative duty to preserve evidence. (R., p.41-101.) It was clear the insurance company could not identify the conveyors involved in the accident and that as a result Spudnik Equipment was substantially prejudiced. (R., pp.67-72.)

Spudnik Equipment argued that Liberty Northwest Insurance had knowledge of pending or probable litigation involving Spudnik Equipment and, therefore, had a duty to preserve evidence that would be relevant to the litigation and necessary for Spudnik Equipment's defense--here, the identity and condition of the equipment involved in the accident. (R., pp.67-72.) Spudnik Equipment further argued that the appropriate resulting penalty for the insurance company's breach of duty was dismissal. In response, the **\*19** insurance company argued that Idaho does not recognize a duty to preserve and that even if it did, Idaho authority does not recognize dismissal as the appropriate sanction. (R., pp.103-104.)

After briefing and oral argument, the district court ruled on Spudnik Equipment's motion. The trial court made three important "findings of fact": First, that "Liberty [Northwest Insurance] describes the conveyor system Grant 4-D Farms used on October 9, 2008 as 'conveyer units that attach to a 'piler' for piling potatoes inside a potato cellar'" and that "the conveyer system involved a number of conveyor belt sections which could be added or detached from the piler, depending upon the particular needs of the day." (R., p.300.) In other words, the court found that the conveyor system alleged to be defective included more than just one "unit" or "table." Second, the district court "found" that following Olmos' injury, Grant 4-D Farms modified or altered "the equipment" used in the conveyor system on October 9, 2008." (R., p.301.) Third, the district court found that the insurance company could identify only one of the "units" or "tables" involved in the accident and, even if it could identify the specific "tables," all the tables had been modified: "The evidence in the record also infers that Grant 4-D Farms cannot identify, save for one, which tables were in use when Olmos was injured." (R., p.309.) Indeed, the district court explained:

Thus, evidence in the record infers that the conveyor system in use on October 9, 2008 may have been used immediately after the accident, and before Liberty's investigator arrived at the scene, and has been in continuous use since the accident. Indeed, Liberty concedes that the conveyors continued to be use used immediately after the accident. Furthermore, the precise conveyor tables in use on October 9, 2008 have not and apparently cannot, be identified given Grant Farms' system whereby tables are modified for interchangeability, and are moved from one cellar to another depending upon the particular need on a given day.

**\*20** (R., p.308.) In addition to making these factual findings, the district court rejected the insurance company's claim that they had no legal duty to preserve evidence and entertained Spudnik Equipment's claim, supported by non-Idaho case law, that the insurance company, as an experienced litigator, had a heightened duty to preserve evidence:

Although Idaho law has yet to address whether a heightened duty attaches to experienced litigators, Idaho certainly recognizes the general legal principle that a party has a duty to preserve evidence that the party knows is material to pending or reasonably foreseeable litigation. Liberty maintains there is no evidence in the record that, immediately following the incident, there was (1) pending or probable litigation involving Spudnik; (2) knowledge by Liberty of the existence or likelihood of litigation; (3) foreseeability of harm to Spudnik; or that (4) the alleged evidence was relevant to potential future litigation.

... a review of the General Investigation Report leaves little doubt that Liberty considered the issue of the machinery malfunction from the outset of its investigation. Accordingly, Liberty knew or should have known that the potential for a products liability lawsuit existed in this case. With the potential for a products liability lawsuit inferred in the General Investigation Report, the relevance of the tables in use at the time of Olmos' injury was obvious, as was the foreseeability of harm to Spudnik if Spudnik was unable to conduct its own investigation of the equipment, particularly where the equipment was identified as used by another farmer prior to Grant 4-D Farms' acquisition.

In summary, then, this Court is left with the abiding belief that Liberty was aware of the potential for a products liability lawsuit against Spudnik and had the corresponding duty to preserve evidence relevant to that lawsuit.

(R., p.308-09.) Notwithstanding the district court's conclusion that Spudnik Equipment had a "duty to preserve" material evidence and that material evidence had not been preserved, the district court denied Spudnik Equipment's motion.

The district court rejected the argument that "spoliation" and the "duty to preserve" are separate doctrines with different requirements for imposing sanctions. The district court, applying the spoliation doctrine, concluded that there was insufficient evidence that **\*21** the breach of the duty to preserve was intentional: "[T]he record lacks sufficient evidence to infer that Liberty intentionally failed to preserve the components of the conveyor system in use on October 9, 2008." (R., p.311.)

Notwithstanding the district court's refusal to grant dismissal, the district court did recognize the prejudice imposed on Spudnik Equipment, the defending party, in a case where material evidence had not been preserved:

On the other hand, Spudnik's inability to defend itself, given Liberty's failure to identify the equipment involved in the accident (save for one table) and the unknown condition of the "mystery tables" is of serious concern. A plaintiff in a products liability action based either on negligence or strict liability must establish (1) an injury; (2) proximately caused by a defect; and (3) the defect existed at the time the product left the control of the manufacturer. When a person or entity other than the product seller changes the design or construction or the product, or changes or removes warnings or instructions that accompanied or were displayed on the product, then the claimant's damages are subject to reduction or apportionment to the extent that alteration or modification was proximate cause of the harm.

If Spudnik cannot investigate the condition of the particular tables in use on October 9, 2008, and the placement of the particular component tables, then it is denied its ability to defend against Liberty's claims. *Seen another way, Liberty may not have evidence to prove a defect existed at the time the conveyor tables left Spudnik's control if it cannot identify which tables were in use on October 9, 2008.*

(R., pp.310-11 (Emphasis added.)) Although, the district court denied Spudnik Equipment's motion, there could be little doubt the district court put Liberty Northwest Insurance on notice that if it could not identify the conveyor tables involved in the accident and, therefore, could not prove that the defect existed at the time the conveyor tables left Spudnik Equipment's control, its claims would be ripe for summary judgment.

At the close of discovery, Liberty Northwest Insurance still had not identified the equipment involved in the accident. Moreover, the insurance company made a calculated \*22 decision to not depose a single witness--stated again for emphasis--Liberty Northwest Insurance depose no individual, no Spudnik Equipment employee or expert witness.

Accordingly, Spudnik Equipment moved for summary judgment on the basis that the insurance company could not make a showing sufficient to establish the existence of the elements essential to the claims it was asserting. (R., p.137.) Spudnik Equipment argued that because the insurance company failed to preserve the "conveyor system" and because of uncontroverted statements and admissions, Liberty Northwest Insurance could not prove the requisite elements of its claims. (R., pp.163-88.)

In response, rather than identifying those elements and identifying evidence by element, the insurance company attempted to obfuscate its burden on summary judgment by trying to refocus the district court's attention on only one or two elements of its causes of action. (R., pp. 137, 162-63.) Liberty Northwest Insurance also argued the motion for summary judgment was an improper motion for reconsideration of the motion to dismiss. (R., p.331.)

The district court first addressed and rejected the insurance company's claim that the motion for summary judgment was an improper attempt at reconsideration:

Spudnik premised its Motion to Dismiss upon Liberty's alleged failure to preserve evidence of the precise conveyor tables. Under the doctrine of spoliation of evidence, Spudnik bore the burden to prove that Liberty acted in bad faith when it failed to record or discover the serial numbers of the conveyor tables in use when Mr. Olmos sustained his injury.

On the other hand, Spudnik's Motion for Summary Judgment requires Spudnik to show the absence of a material fact. Spudnik's Motion for Summary Judgment does not seek sanctions for intentional **neglect**, but adjudication given the lack of evidence of negligent design or failure to warn. Thus, Spudnik's Motion is not an improper motion for reconsideration.

\*23 (R., p.21.) The district court then turned to the question of whether the insurance company sufficiently identified evidence supporting the elements of the product liability and warranty claims.

The district court noted that the insurance company attempted to argue that "the evidence shows that the conveyors were manufactured with defective designs and warnings." (R., p. 533.) However, the court rejected this argument for the same reasons identified by Spudnik Equipment in their supporting memoranda:

[T]he evidence fails to show which conveyors were in use on the date in question. Thus, the jury cannot determine what condition Spudnik purchased the conveyors; whether the conveyors were modified by Spudnik, Grant 4-D Farms, or a third party; the extent of such modifications; what warnings, if any, each conveyor table bore; the condition of the tables when they left Spudnik's possession, or the type of maintenance performed upon a particular table. Despite the identification of one of the conveyors used on October 9, 2008, the evidence does not suggest whether that table involved one of the offending nip points, or was merely a component part of the system.

(R., pp. 533-34.) The district court recognized that if the insurance company could not identify what specific conveyor tables were involved in the accident, it could not proffer evidence sufficient to show the condition of the equipment at the time it left Spudnik Equipment's control--an element of a product liability claims whether predicated on negligence or strict liability. (R.,

p.520.) Indeed, without identifying the conveyors in the accident, the insurance company could not affirmatively prove that the conveyors that caused the injury were even Spudnik Equipment conveyors.

The district court also recognized that “[w]ithout evidence of which conveyor tables were in use when Mr. Olmos was injured, Liberty has not shown the absence of reasonable secondary causes” and that the insurance company would essentially be asking the “jury to \*24 consider, and Spudnik to defend, against a hypothetical set of conveyor tables, assuming any other secondary causes do not exist.” (R., p.520.)

Addressing Liberty Northwest Insurance's failure to warn claims, the district court again recognized that without being able to identify the specific tables that comprised the “conveyor system,” it was impossible to determine what warnings existed and whether those warnings were inadequate:

Next, Liberty argues that Spudnik has failed to make any offer of proof concerning its warnings, if any, that came with or were attached to the conveyors of any of the models sold to Grant 4-D Farms. But without proof of when the tables involved were purchased, their condition when they left Spudnik's hands, their condition at the time of the accident, and the factors affecting causation, Liberty fails to raise issues of material fact.

(R., p. 536.) The district court again noted the “secondary” cause issue--that Spudnik Equipment was precluded from being able to make a secondary cause argument because the insurance company could not identify the equipment involved in the accident:

Assuming Spudnik failed to warn end users of a risk of harm from the nip points created when two conveyor tables are connected, and assuming that the lack of warning caused Olmos' injuries, Spudnik must be given the opportunity to mitigate its damages by presenting evidence of Grant 4-D Farm's alteration or modification of the tables in use, or its failure to conduct maintenance upon a particular table. Indeed, a jury could potentially decide that the maintenance and/or alterations to the tables was the proximate cause of the Olmos' injuries. Without identification of the table in question, Spudnik is prevented from fully investigating and presenting its case.

(R., pp. 536-37.)

Finally, the district court addressed Liberty Northwest Insurance's express and implied warranty claims. (R., p.537.) The district court granted summary judgment as to the “express warranty” claim because “Liberty concedes that the evidence does not reflect any verbal express warranties.” (R., p.537.) With regard to the implied warranty claims, the \*25 district court recognized that summary judgment was again appropriate because the insurance company could not identify what tables were in use and, therefore, could not proffer evidenced of a warranty associated with any particular table manufactured and sold by Spudnik Equipment involved in the accident:

Once again, it is impossible to know what implied warranties, if any, apply since the evidence does not identify which tables (except for one) were in use. Without identification of the tables, Spudnik cannot discover when and from whom Grant 4-D Farms purchased the tables and what sort of warranties, if any, accompanied the purchase.

Although Liberty argues that “the sales documents are part of the record before the Court,” the sales documents in evidence trace only to the one table, out of a system of connected tables, which figured into Olmos' accident. Indeed, it is unknown whether the identified table formed half of the nip point which injured Olmos, or not. It may have only formed part of the line, without being the point of contact. Liberty's answers to interrogatories describe “5-6 conveyors” involved in the operation on October 9, 2008. Therefore, the purchase date of one component does not aid the jury's determination of the warranty question, since tables were purchased at different times, from different places.

(R., p.537.)

Having addressed the six substantive causes of action found in the insurance company's complaint and concluding that Liberty Northwest Insurance failed to raise a material fact issue as to any, the district court concluded that the lawsuit should be summarily adjudicated and that Spudnik Equipment's motion for summary judgment should be granted. (R., p.538.)

Spudnik Equipment submits that district court's findings and conclusions were accurate its order granting summary judgment should be upheld on appeal.

## \*26 ISSUES

Petitioner-Appellant and Cross-Respondent, Liberty Northwest Insurance, states the issues on appeal as:

I. Did the District Court err in granting summary judgment to the Respondent?

II. Did the District Court err by not granting summary judgment to the Appellant?

(Appellant's Brief, pp. 5-6.)

Spudnik Equipment, as the respondent, rephrases the issues on appeal as:

I. Where Liberty Northwest Insurance cannot identify the “conveyor system” involved in the accident and, therefore, cannot raise material issues of fact by presenting evidence supporting the elements of its claims, was summary judgment properly entered by the district court in favor of Spudnik Equipment?

II. Where Liberty Northwest Insurance cannot identify the “conveyor system” involved in the accident and, therefore, cannot establish a material issues of fact with respect to its claims, and where there is evidence in the record of secondary causes, misuse and mitigating circumstances, did the district court properly conclude the insurance company was not entitled to summary judgment.

Spudnik Equipment, as a cross-appellant, submits a third issue on appeal:

III. Should Idaho recognize a difference between the doctrine of spoliation and a breach of a plaintiff's duty to preserve evidence such that a district court can impose an appropriate sanction without having to establish that the breach of the duty to preserve was an intentional act?

## \*27 ARGUMENT

### ***I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE LIBERTY NORTHWEST INSURANCE FAILED TO MEET ITS BURDEN OF IDENTIFYING EVIDENCE SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE FOR PRODUCT LIABILITY AND BREACH OF WARRANTY***

#### ***A. Introduction***

The insurance company claims the district court erred in granting summary judgment to Spudnik Equipment. See generally, Appellant's Brief, p.7. Specifically, Liberty Northwest Insurance claims the district court “made factual errors relevant to the issue of whether there existed genuine issues of material fact.” Appellant's Brief, p.7. It also appears that the insurance company is arguing the district court applied the wrong summary judgment standard. See Appellant's Brief, p.8. These arguments lack merit. The law is well-established. To survive summary judgment, a plaintiff has the burden of identifying evidence sufficient to meet the elements of the claims asserted. Moreover, the insurance company did not submit evidence sufficient to establish

a prima facie case as to its asserted claims. Accordingly, the district court properly adjudicated the matter before it by granting summary judgment.

### ***B. Standard of Review and Applicable Legal Standard***

“On appeal from the grant of a motion for summary judgment, this Court applies the same standard used by the district court originally ruling on the motion.” *Blankenship v. Washington Trust Bank*, -- Idaho --, --, 281 P.3d 1070, 1073 (2012) (Internal quotation marks and citations omitted.). “Summary judgment is properly issued when the non-moving party bearing the burden of proof [here, Liberty Northwest Insurance] fails to make a showing sufficient to establish the existence of an element essential to that party's case.” \*28 See *Sparks v. St. Luke's Reg. Med. Ctr., Ltd.*, 115 Idaho 505, 509, 768 P.2d 768, 772 (1988). The mere existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case and on which he will bear the burden of proof at trial. *Johnson v. K-Mart Corp.*, 126 Idaho 316, 317, 882 P.2d 971, 972 (Ct. App. 1994) (reh'g denied.); see also *Zimmerman v. Volkswagen of Am., Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996) (In order to forestall summary judgment, “the plaintiff must do more than present a scintilla of evidence, and merely raising the ‘slightest doubt’ as to the facts is not sufficient to create a genuine issue.”) (Internal citations omitted.).

Here, the issue is simple. Liberty Northwest Insurance could not identify evidence at the trial court sufficient to prove the requisite elements necessary to prove its case. This reality becomes clear when each element of each claim is considered.

### **C. Liberty Northwest Insurance Failed To Meet Its Burden Of Identifying Evidence Supporting Its Product Liability Claims**

“To establish a case for negligent design or strict liability, a plaintiff must establish that (1) the product in question was defective [unreasonably dangerous], (2) the defect existed at the time the product left the manufacturer's control, and (3) that the defective product was the proximate cause of the plaintiff's injuries.” *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 821, 979 P.2d 1174, 1179 (1999); see also *Westfall v. Caterpillar, Inc.*, 120 Idaho 918, 920, 821 P.2d 973, 975 (1991). Idaho's model jury instructions cite Puckett but also include the requirement that a plaintiff prove the alleged defective product was “manufactured” by the defendant. See IDJI 10.02.1. Thus, Liberty Northwest Insurance has the burden at trial of proving each of the following propositions:

- \*29 1. Spudnik Equipment was the manufacturer of the “conveyor system”;
- 2. The “conveyor system” was defective;
- 3. The alleged defect existed when the “conveyor system” left Spudnik Equipment's control; and
- 4. The defect was a proximate cause of injury to Mr. Olmos.

See IDJI 10.02.1 (citing *Puckett*, 132 Idaho 816, 979 P.2d 1174 (1999)). In addition to these elements, a plaintiff must also establish “not only that the product was unreasonably dangerous, but there must be a lack of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability.” *Westfall*, 120 Idaho at 920, 821 P.2d at 975. Significantly, the insurance company largely ignores these articulated requirements focusing almost exclusively on the second element, whether the product was allegedly “defective”--this incomplete analysis is by itself an admission of evidentiary shortcomings.

# 1. Liberty Northwest Insurance cannot prove that Spudnik Equipment manufactured the “conveyor system” that allegedly caused the accident

As an initial matter, it is important to understand the product that Liberty Northwest Insurance claims is defective. The alleged defect is a nip point caused by two conveyor belts running toward each because they use three-phase power. See Appellant's Brief, p.2. By definition, a single conveyor is not, by itself, defective because the single conveyor alone does not pose an unreasonable risk of harm. If any defect exists, that alleged defect can only be present when the conveyor is used with another conveyor and other related equipment, including a power source. This is consistent with the insurance company's complaint, which does not allege a defect in the individual conveyor, but in the “conveyor \*30 system.” (R., p.13 (Complaint 1113) (“Defendants designed, manufactured and placed the product in the stream of commerce for use a potato conveyor system.”) (Emphasis added.)). Thus, the initial question is whether Liberty Northwest Insurance can proffer evidence that Spudnik Equipment was the manufacturer of the product it claims was defective--the “conveyor system.”

The short answer to that question is no. There is no evidence proving that Spudnik Equipment manufactured the “conveyor system” involved in the accident. The insurance company did not depose anyone from Spudnik Equipment and made no discovery request that would show that Spudnik Equipment manufactured the “conveyor system” involved in the accident. There are no Spudnik Equipment invoices and no sale or manufacturing documents connecting a “conveyor system” manufactured by Spudnik Equipment to Mr. Olmos' accident--nor could there be as the “conveyor system” that was involved in the accident cannot be identified. Moreover, what makes this element even more difficult to prove is the fact that the farm does not buy new equipment. Grant 4-D Farms buys equipment used from other farms: “So in terms of new equipment, literally, I think the only thing that we have purchased brand-new from Spudnik is that one planter. I believe that's the only thing that we've brought brand-new from them.” (R., p.468 (Grant Depo., p.25, Ls.16-19.)) Thus, here, the insurance company simply cannot connect the factual dots.

The fact that the insurance company cannot identify the equipment involved in the accident was a fact central to the district court's analysis and a factual determination that cannot be disputed. As explained in the order on the motion to dismiss: Liberty does not deny that certain conveyors, used in the conveyor system on the date of Mr. Olmos' injury, were never identified and put back into use \*31 since the date of the accident. The evidence in the record also suggests that parts or all of the conveyor system at issue were modified either before or after the accident.

Grant testified that the conveyor system was purchased used. The evidence suggests that the purchase of at least one of the conveyor tables was facilitated between Steve Young and Grant 4-D Farms through Spudnik. Although Spudnik equipment is manufactured “cellar specific” (wired for a particular power source and for a particular cellar), Grant 4-D Farms modified their conveyors so that they were interchangeable and could be moved seamlessly between any of Grant 4-D Farms four to five different cellars [after the accident]. Grant 4-D Farms modified the bolt connection pattern between the conveyors, adapted plugs, and added phase reverses onto every conveyor. Some of the farms, from whom Grant 4-D Farms purchased used equipment, already had phase reversers installed on the equipment. Duane Grant did not know whether the previous owners or Spudnik adapted the equipment with the phase reversers.

Duane Grant testified that Grant 4-D Farms does not keep a record of the modifications made to particular conveyors. Grant 4-D Farms undertakes most of the modifications, save for the installation of remote control systems on pilers, which is typically contracted out to Spudnik.

When asked whether he could identify all the equipment that was present on the day of the accident, Duane Grant responded:

The only way it would be possible--and it may be possible. But the only way it would be possible would be if the investigator that was sent by Liberty Northwest pulled serial numbers off of the pieces of equipment that were in this conveying system.

Grant recalled that Liberty's investigator came fairly quickly after the accident [and as explained below did not record the serial numbers].

According to Calvin Miller, one of the partners of Grant 4-D Farms, it would be difficult to identify the equipment in the potato cellar on the day of the accident. Indeed, Miller, when asked whether the equipment at issue could be identified, responded: "...how would you know which conveyor? It would be difficult to pinpoint exact conveyors."

(R., pp. 304-07.)

**\*32** The district court's factual findings are not erroneous. Duane Grant makes clear there was only one way to identify the equipment involved in the accident:

Q. Is it possible, based on your records and based on the people that you have, to identify all the equipment that was present on the day of the accident?

A. So--

Q. Is that even possible?

A. The only way it would be possible--and it may be possible. But the only way it would be possible would be if the investigator that was sent by Liberty Northwest pulled serial numbers off of the pieces of equipment that were in this conveying system.

Q. But there's nobody at Grant 4-D Farms that could--

A. No.

**Q. --put together the accident scene?**

A. These conveyors are completely interchangeable. We move them from cellar to cellar all the time.

(R., pp.474-75 (p.51, L.13 - p.52, L.15).)

And, as explained in its General Investigation Report, the insurance company's investigator identified only "one of the tables [conveyors]" and only wrote down the serial number to that one conveyor. The report says:

The number "2721" is painted on the side of one of the tables that we know for sure was involved in the event.

The Serial Number on this unit is: 877

The Model Number is 1205-96

**\*33** (R., p.191.) Liberty Northwest Insurance concedes it did not write down any other serial numbers. (R., 427 (p.44, Ls.1-3).) Thus, as explained by the district court, there is no way to tell where that one identified conveyor fit into the "conveyor system":

...it is unknown whether the identified table formed half of the nip point which injured Olmos, or not. It may have only formed part of the line, without being the point of contact. Liberty's answers to interrogatories describe "5-6 conveyors" involved in the operation on October 9, 2008.

(R., p.537.) Because the insurance company cannot identify the specific conveyors it is pragmatically impossible for the insurance company to prove that the unidentifiable “conveyor system” was manufactured by Spudnik Equipment. Any related claim is, at best, speculative and unqualified.

At the district court level the insurance company argued that “identif [ication] of the specific equipment” involved in the accident is “irrelevant.” (R., p.337.) Having lost that argument below, Liberty Northwest Insurance now asserts that there is “general” testimony sufficient to meet its burden of proving that the conveyors involved in the accident were manufactured by Spudnik Equipment (notwithstanding the fact that insurance company cannot identify the “conveyor system” involved in the accident).

In support of its assertion, the insurance company identifies testimony from both Mr. Saucedo and Mr. Grant's depositions. (Appellant's Brief, p.9.) Mr. Grant's testimony is not what the insurance claims it to be. Mr. Grant provides general testimony regarding the way the farm typically handled Spudnik and Double L conveyors-that before 2009 the farm would try to keep them separated by brand. But even on this point Mr. Grant concedes that “we would occasionally add in a Double L conveyor into a Spudnik line for a brief period.” (See R., p.478 (p.66, Ls. 6-15).) This general testimony that this particular line was \*34 generally or even mostly Spudnik Equipment conveyors is insufficient. Mr. Grant's more specific testimony-testimony that affirmatively proves the individual conveyors cannot be identified is determinative. Mr. Grant's mere qualified and speculative statement that he believes the conveyors were all Spudnik Equipment conveyors with the possibility that a Double L conveyor could have been used in the line is simply insufficient to prove the first element-that Spudnik Equipment manufactured the “conveyor system” that allegedly caused the accident.<sup>1</sup>

Similarly, Mr. Saucedo is not in a position to offer evidence that “Spudnik Equipment” manufactured the conveyor system in question. The fact that the insurance company even attempts to make this argument is surprising given what is known about Mr. Saucedo-a first year supervisor that had no experience running conveyors prior to the year that Mr. Olmos was injured.<sup>2</sup> Regardless, Mr. Saucedo is not qualified to give testimony on whether Spudnik Equipment “manufactured” a particular “conveyor system” including all its component parts. Mr. Saucedo did not purchase the conveyors, nor does he have any \*35 knowledge regarding whether the conveyors-conveyors that were both “used” and “modified” conveyors-were “manufactured” by Spudnik Equipment. At best, without being able to identify the specific conveyors there can only be speculation. Accordingly, reliance on his testimony is misplaced and insufficient. There is no evidence that Spudnik Equipment “manufactured” the conveyor system.

## **2. Liberty Northwest Insurance cannot identify evidence that the conveyor system involved in the accident is defective.**

In addition to not being able to identify evidence sufficient to create a genuine issue of material fact as to the first element, the insurance company cannot prove that the unidentified “conveyor system” was defective--stated differently, that the “conveyor system” involved in the accident exposed a reasonably expected user to an unreasonable risk of physical injury. Spudnik Equipment concedes the insurance company's expert witness, Dr. Richard Gill, proffers testimony pontificating on the “dangers” of conveyors in general and argues that it is “reasonable” to expect an **elderly** man that is hard of hearing, with no safety training and that is described as possibly mentally slow, to be an expected end user. There is, however, no evidence that links the conveyors described by Dr. Gill to the conveyors involved in the accident. Dr. Gill did not inspect the conveyors involved in the accident, nor could he because they could not be identified. The district court put it this way:

Liberty's expert witness, Dr. Richard Gill, testified that he had no specific knowledge or understanding of the kind of maintenance performed upon the conveyors, or the adaptations made to the tables. *Dr. Gill could not inspect the conveyors involved in the accident since they are unidentified.*

(R., pp. 535-36 (Emphasis added.).)

**\*36** Thus, at best, Dr. Gill's opinions are nothing more than statements about, borrowing a term used by the district court, a "hypothetical set of conveyor tables"—tables that are not factually connected to the "conveyor system" that was involved in Mr. Olmos' accident.<sup>3</sup> Accordingly, the evidence as to this element is insufficient to avoid summary judgment as there is no evidence showing that the particular conveyors involved in the accident were defective.

Moreover, the insurance company cannot rely on the testimony of the owners of the equipment, Grant 4-D Farms, on the question of whether the conveyors were defective as Mr. Miller, one of the principals, plainly explains that in his opinion the conveyor was not "defective":

Q. Do you know whether the equipment that was set up at the cellar on the day of the accident, whether or not it was - whether or not Grant Farms continued to use that equipment?

A. I can't--I don't know. But I imagine--I would say yes, we--we'd continue.

Q. And why? What do you base that answer on?

A. Well, it would not be defective equipment. There would be no reason not to use it.

Q. Do you believe the conveyor was defective?

A. No.

**\*37** (R., p.213 (p.37, Ls.9-20; p.39, Ls.19-21).) In sum, there is no evidence in the record to support the claim that the "conveyor system" involved in the accident was defective.

### ***3. Liberty Northwest Insurance cannot identify evidence that the alleged defect existed when the "conveyors" left Spudnik Equipment's control***

The most obvious defect in the insurance company's argument is its inability to identify evidence sufficient to show that the claimed defect existed when the allegedly defective conveyors left Spudnik Equipment's control. Again, this is an impossible task given Liberty Northwest Insurance's inability to identify the conveyors involved in the accident, the fact that the farm does not purchase new equipment, and where there are no records regarding modifications, repairs or alterations made to the conveyors before or after they were purchased by Grant 4-D Farms. Indeed, it was on this very element that the district court gave fair warning. (R., p.311 ("Liberty may not have evidence to prove a defect existed at the time the conveyor tables left Spudnik's control if it cannot identify which tables were in use on October 9, 2008.").)

The fatal defect is highlighted at the granular level. Liberty Northwest Insurance has been clear as to what it claims is the alleged defect: "While the belts would normally run in the same direction, because the conveyors used three-phase electric motors, 'depending on how the phases of the power are matched up with the phases of the motor wiring, the motors will turn one direction or the other...' (Appellant's Brief, p.3 (Emphasis added.)) The alleged defect, therefore, necessarily involves three-phase electricity and how the phases were wired. The faulty assumption is that all Spudnik Equipment conveyors use three-phase electricity, that all Spudnik Equipment conveyors are wired the same, or that **\*38** the conveyors involved in the accident even had the possibility of reversing directions at the time they left Spudnik Equipment's manufacturing facility. There is no evidence in the record on this point--nothing that shows the condition of the conveyors at the time they left Spudnik Equipment's control.

To begin with, the insurance company cannot prove that the conveyors that were involved in the accident left Spudnik Equipment's manufacturing facility wired for three-phase electricity. As admitted by Grant 4-D Farms' principal Duane Grant, Spudnik Equipment manufacturers conveyors that use all different kinds of electricity, not just three-phase electricity. And,

as admitted by Mr. Grant, there is no way to know how a particular conveyor had been rewired and/or reconfigured to meet the needs of a particular farm:

Q. In your shop when you bring in a piece of used equipment, a used conveyor, do you have to make any modifications to the conveyor to make that possible?

A. Yes.

Then electrically [referring to modifications made when a used piece of equipment is purchased], we have the same--when you buy these conveyors, either directly from Spudnik, I would assume, definitely when you buy them on farm sales [which was allegedly the case here], *they can come with a wide range of different electrical connections on the end, depending on the amperage, the voltage, that a particular cellar-farmer is going to want for his cellar. **You can buy them single phase, 220. You can buy them three-phase, 220. You can buy them three-phase, 480. You can buy them with some different iterations there as well and with different styles of plugs depending on the amperage that you're planning to go run through them.***

So we have adapted all of ours to have the same style plugs so that any conveyor - the male from any conveyor can fit the female on any other conveyor.

**\*39** Q. ... Then that's standard practice whenever you buy used conveyors, is to bring them in and to, again, like we just said, make the cellar interchangeable?

A. Yes.

Q. Do you keep a record of that work as it applies to particular conveyors?

A. No.

Q. So there wouldn't be any way to tell whether or not those modifications were made to any of the conveyors that were at the cellar on the day of Mr. Olmos' accident?

A. I don't know of any way to tell, Danny. No.

(R., pp.238-40 (p.52, L.17 - p.57, L.6) (Emphasis added).)

Mr. Grant's point is well taken. Because Spudnik Equipment manufactures conveyors according to what the farmer wants and is using with a particular cellar (making them "cellar specific"), a conveyor may or may not have been manufactured with three-phase electricity. As such, where Grant 4-D Farms purchases conveyors used and where the conveyors have not been identified, there is no way to know whether the conveyors involved in the accident left Spudnik Equipment's control with three-phase electricity or if some subsequent farm or even Grant 4-D Farms changed or modified the electric component, including the electric wiring or the phase reversers or some other modification related to the wiring. In short, without being able to identify the specific conveyors in the accident, it is impossible to know what condition those conveyors were in at the time they left Spudnik Equipment's control--more specifically, whether they used single-phase or three-phase electricity and/or had phase reversers or other subsequent features that could affect the alleged defective condition. There is simply no way to tell whether the conveyors **\*40** had been reconfigured or rewired by a prior owner or even what the make-up of the conveyor system was on the day it left the control of Spudnik Equipment. As explained by the district court:

[T]he evidence fails to show which conveyors were in use on the date in question. Thus, the jury cannot determine what condition Spudnik purchased the conveyors; whether the conveyors were modified by Spudnik, Grant 4-D Farms, or a third party; the extent of such modifications; what warnings, if any, each conveyor table bore; the condition of the tables when they left Spudnik's possession, or the type of

maintenance performed upon a particular table. Despite the identification of one of the conveyors used on October 9, 2008, the evidence does not suggest whether that table involved one of the offending nip points, or was merely a component part of the system.

(R., pp. 533-34 (Emphasis added.).)

Thus, regardless of whether the insurance company can generally proffer evidence that the conveyors were manufactured by Spudnik Equipment, there is simply no evidence in the record that shows the configuration of the components of the “conveyor system” involved in the accident at the time it allegedly left Spudnik Equipment's manufacturing facility. The insurance company has no response to this argument. Indeed, Liberty Northwest Insurance fails to even address this element in their opening brief-- a plain admission that no evidence exists on this point and that summary judgment was properly entered in favor of Spudnik Equipment. In sum, the insurance company has not and cannot meet its burden and summary judgment is, therefore, appropriately entered.

***4. Liberty Northwest Insurance cannot identify evidence that supports its claim that the claimed defect was a proximate cause of the accident***

Clearly, Mr. Olmos' was injured and he was injured between two conveyors. There is no dispute as to this point. However, because those conveyors are unidentified, there is \*41 an obvious lack of evidence on the question of causation. At best, the insurance company can only describe a hypothetical “conveyor system.” Without being able to identify the actual conveyor system that was involved in the accident it is in a realistic way impossible for the insurance company to proffer evidence that any claimed defect to an unidentified product caused the accident. And, as explained by the district court and the following sections, the dangers of allowing such “hypothetical” analysis has substantial effects on a defendant's ability to defend such a case. Needless to say, without identifying the particular conveyors involved in the accident, it is impossible to say that any particular defect caused the accident.

***5. Liberty Northwest Insurance cannot show a lack of evidence of abnormal use or the absence of evidence of reasonable secondary causes***

Liberty Northwest Insurance must also show “not only that the product was unreasonably dangerous, but there must be a lack of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability.” [Westfall, 120 Idaho at 920, 821 P.2d at 975](#). In this case, the record shows substantial “abnormal use” and “reasonable secondary causes” that would eliminate liability. There is no genuine issue of material fact as to these issues. It is incontrovertible facts that:

- 1) Mr. Olmos missed the pre-harvest safety and training meeting (R., p.436);
- 2) Mr. Olmos was **elderly** (R., pp.220, 235);
- 3) Mr. Olmos was hearing impaired (R., p.235);
- 4) Mr. Olmos' supervisor believed Mr. Olmos was “mentally slow” (R., p.436);
- 5) Mr. Alvarez, who supervised the cellar managers, testified that it was a mistake to have Mr. Olmos taking apart and connecting the conveyors (R., p. 221);

\*42 6) George Olmos testified that because of his father's hearing impairment, his father should not have been working with the conveyor system (R., p.251.); and

7) Duane Grant testified that if Grant 4-D Farm's safety procedures had been followed, Mr. Olmos would not have been injured (R., p.237).

These undisputed facts affirmatively establish abnormal use by Grant 4-D Farms--it is not normal to use conveyors under the conditions cited above.

In response, the insurance company argues that “[t]here is no evidence that any modifications or the condition of the equipment contributed to Mr. Olmos' injury.” See Appellant's Brief, p.13 (Format alterations made because quote was taken from the heading). This argument makes Spudnik Equipment's primarily stated point--it is impossible to make any argument for or against causation as to the modifications or the condition of the equipment because Liberty Northwest Insurance did not preserve the equipment much less preserve the equipment in its accident state. The important point is, however, that it is the insurance company's burden to show the condition of the equipment including a lack of evidence of abnormal use and secondary causes which would eliminate liability. Again, something it cannot do.

Notwithstanding the lack of evidence on this issue, the record shows that separate and apart from the actual (unknown) condition of the equipment, the farm's use of the conveyor system was not normal. It is simply not normal to have someone with Mr. Olmos's disabilities working on conveyors under the circumstances that he was working--a fact admitted by the manager of the farm and by Mr. Olmos' own son. Accordingly, the insurance company fails to meet its burden as to this requirement.

#### **\*43 D. Liberty Northwest Insurance Cannot Meet Its Burden Of Proving Its Claim Based On Failure to Warn**

For many of the same reasons articulated above, Liberty Northwest Insurance cannot meet its burden of proving its “failure to warn” claims. To prevail on a “failure to warn” cause of action the insurance company must prove:

1. Spudnik Equipment sold the product;
2. Spudnik Equipment knew or should have known that danger to users could result from a particular use of the product;
3. Spudnik Equipment failed to give adequate warning of such danger;
4. The failure to give adequate warning was a proximate cause of Mr. Olmos' injuries.

See IDJI 10.06 (citing [Puckett](#), 132 Idaho 816, 979 P.2d 1174 and [Restatement \(Second\) Torts](#), § 402A, comment h (1977)). Once again, the insurance company's inability to identify the “conveyor system” involved in the accident is dispositive.

As clearly outlined and supported above, Liberty Northwest Insurance has not identified the “conveyor system” and cannot meet its requisite burden of proving that Spudnik Equipment sold the “conveyor system.” The point need not be belabored. The same lack of evidence that makes it impossible for the insurance company to prove that Spudnik Equipment “manufactured” the product makes it impossible for the insurance company to prove that Spudnik Equipment “sold” the unidentified product. Similarly, because the insurance company has identified only one component of the “conveyor system” and cannot even identify where that component part fit in the conveyor line, it is equally impossible to determine whether the “conveyor system” failed to give adequate warning of the alleged danger. That question can only be determined by considering the **\*44** “conveyor system” as a whole and after considering what warnings existed at the time of the accident and at the time of the sales transaction. There is a complete lack of evidence on these points. Furthermore, as noted above, it is impossible to prove causation without being able to identify the “conveyor system” that was involved in the accident.

[Rule 56 of the Idaho Rule of Civil Procedure](#) requires entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which

that party will bear the burden of proof at trial. The insurance company has not met its burden in regards to the above cited elements and summary judgment was, therefore, appropriately entered.<sup>4</sup>

### **E. Liberty Northwest Insurance Cannot Meet Its Burden Of Proving Its Warranty Claims**

Liberty Northwest Insurance's inability to identify the "conveyor system" also precludes it from asserting any warranty claim related to the "conveyor system." There is \*45 no evidence in the record that there was any "warranty," express or implied, given regarding the "conveyor system." The district court reasoned:

Finally, as to express or implied warranties, Liberty concedes that the evidence does not reflect any verbal express warranties. Therefore, summary judgment as to Liberty's express warranty claim shall be granted.

With regard to implied warranties, Liberty takes the position that Spudnik has not shown the implied warranties were disclaimed or, if disclaimed, that the disclaimer was effective. Once again, it is impossible to know what implied warranties, if any, apply since the evidence does not identify which tables (except for one) were in use. Without identification of the tables, Spudnik cannot discover when and from whom Grant 4-D Farms purchased the tables and what sort of warranties, if any, accompanied the purchase.

(R., p.537.) It appears that Liberty Northwest Insurance is not challenging the district court's determination as to the warranty claims as the insurance company's brief does not address these claims. To the extent the insurance company asserts an argument that the district court erred, Spudnik Equipment incorporates by reference its argument set forth in its supporting memoranda to the district court. (See R., p.184-88, 506-08.)

In sum, Liberty Northwest Insurance's inability to identify the conveyor system involved in the accident is controlling. This inability, coupled with the insurance company's choice to not depose any Spudnik Equipment witness effectively precludes Liberty Northwest from being able to offer evidence supporting the elements of its product liability and breach of warranty claims. Consequently, summary judgment was properly entered and should be affirmed on appeal.<sup>5</sup>

## **\*46 II. IDAHO LAW SHOULD BE MODIFIED TO DISTINGUISH BETWEEN THE DOCTRINE OF SPOILIATION AND A BREACH OF A PLAINTIFF'S DUTY TO PRESERVE EVIDENCE TO ENABLE THE DISTRICT COURT TO IMPOSE AN APPROPRIATE SANCTION WITHOUT HAVING TO ESTABLISH BAD INTENT**

### **A. Introduction**

The district court found Liberty Northwest Insurance had notice of its potential product liability claims and knew the conveyor system involved in the accident was material to its claims against Spudnik Equipment. Notwithstanding that notice, the district court also found that Liberty Northwest Insurance did not take precautions to preserve the identity of the conveyor system. Explicit in the district court's ruling was the finding that the insurance company's failure to preserve evidence directly impacted Spudnik Equipment's ability to fairly defend itself against the very accusations that Liberty Northwest Insurance presently asserts: "If Spudnik cannot investigate the condition of the particular tables in use on October 9, 2008 [the day of the accident], and the placement of the particular component tables, then it is denied its ability to defend against Liberty's claims." (R., p.311.) Notwithstanding this clear breach of the insurance company's duty to preserve material evidence and the resulting prejudice—that Spudnik Equipment is denied its ability to defend against the insurance company's claims—the district court concluded it was bound by Idaho law that required a finding of "intentional conduct" in order to sanction the insurance company or otherwise remedy the problem. (R., p.302.)

Spudnik Equipment argues on appeal that Idaho law should be clarified to recognize a difference between a breach of the duty to preserve evidence and spoliation, particularly \*47 under the circumstances here, where the breach of the duty to preserve is committed by a plaintiff, an experienced litigator, and where the breach substantially impedes the defendants ability to fairly or fully defending itself-a prejudice that is crippling and realized regardless of malicious intent or bad faith.

## B. Legal Standards

In reviewing mixed questions of law and fact, “[appellate courts] will differentiate among the fact-finding, law-stating, and law-applying functions of trial courts.” *Sells v. Robinson*, 141 Idaho 767, 771, 118 P.3d 99, 103 (2005) (Citations and quotation marks omitted.). Findings of fact made by the district court will be upheld where they are supported by substantial and competent evidence in the record. *Id.* This Court freely reviews a district court's application of law to its findings of facts. *Id.* The existence of a duty to preserve evidence is a question of law to be determined by the court. See W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts*, § 37, p. 236 (5th ed. 1984). Here, Spudnik Equipment takes no issue with the factual findings. Rather, Spudnik Equipment requests this Court modify existing Idaho law, apply that modified law to the facts as determined by the district court and provide appropriate relief.

## C. Idaho Law Should Be Modified To Permit District Courts Discretion To Fashion An Appropriate Sanction Where An Experienced Litigator Breaches Its Duty To Preserve Evidence And Where That Breach Results In Substantial Prejudice

Preservation of evidence is of paramount concern in any case. It is, however, of even heightened importance in product liability cases where liability often turns on the condition of the product at the time of the accident. Here, Liberty Northwest Insurance, the plaintiff, an insurer and an experienced litigator, failed to preserve evidence relevant to this \*48 lawsuit--before and after the insurance company initiated the civil action. The district court found that Liberty Northwest Insurance had knowledge of the potential litigation and yet did not preserve evidence. (R., pp.308-10.) The district court further determined that the potential prejudice was known or should have been known by Liberty Northwest Insurance-that the insurance company's breach of its duty to preserve evidence would effectively preclude Spudnik Equipment from making any argument as to the condition of the equipment, making it impossible to challenge claims of causation or defenses relating to causation or mitigation. And, finally, the district court explicitly found that Spudnik Equipment suffered prejudice being “denied its ability to defend against Liberty's claims.” (R., p.311.) As explained below, notwithstanding these significant findings, the district court concluded that it did not have discretion to fix an appropriate remedy because Idaho law requires a finding of intentional misconduct. (R., p.310.)

### 1. The Doctrine of Spoliation Should Be Treated Differently Than A Breach Of The Duty To Preserve Evidence By A Plaintiff

It is certainly recognized that this Court has stated that “[t]he concept of spoliation requires a state of mind that shows a plan or premeditation.” *Ricketts v. E. Idaho Equip., Co., Inc.*, 137 Idaho 578, 51 P.3d 392 (2002); *Courtney v. Big O Tires, Inc.*, 139 Idaho 821, 824, 87 P.3d 930, 933 (2003) ( “[T]he circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case.”) However, the requirement that a breach of the duty to preserve be intentional and in bad faith is, as illustrative by the present circumstances, too restrictive on the district court's discretion. As explained below, the “intentional” requirement was born out of \*49 criminal law and intentional tort law where the destroyer of evidence has always been the defendant in an action where the plaintiff is essentially asserting a tort claim against the destroyer of evidence, most commonly the defendant.

Here, unlike any prior Idaho Supreme Court case, it is the plaintiff, Liberty Northwest Insurance, that breached its duty to preserve evidence. And, it is the plaintiff that maintains that it is entitled to pursue its claims without consequence for its breach of duty. Indeed, the insurance company's breach has unquestionably put it in a better litigating position. Such action cannot be condoned and certainly should not be encouraged.

The confusion between “duty to preserve evidence” and “spoliation” is highlighted by *Bromley v. Garey*, one of the earliest Idaho cases to directly address spoliation. In *Bromley*, this Court explained that

[t]he evidentiary doctrine of spoliation recognizes it is unlikely that a party will destroy favorable evidence. Thus, the doctrine of spoliation provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party.

132 Idaho 807, 812, 979 P.2d 1165, 1170 (1999) (citing *Stuart v. State*, 127 Idaho 806, 907 P.2d 783 (1995)). Significantly, the authority *Bromley* relied upon, *Stuart v. State*, was a post-conviction petition based on an underlying criminal matter where the alleged bad actor was a law enforcement agency and the focus was on a *Brady* violation). See *Stuart*, 127 Idaho at 815, 907 at 792. Understandably, prosecutors and law enforcement are held to a higher constitutional standard regarding the safe guarding of evidence than a party in a product liability case.

However, to be clear, the above-cited statement from the *Bromley* court is not conceptually consistent and failed to make an important distinction. A duty to preserve \*50 imposes an affirmative obligation on a party to gather or preserve evidence. A failure to take that affirmative act is a breach of that duty. It is an act of omission. Spoliation, or the destruction of evidence, can only happen once evidence is gathered or controlled. It is not an act of omission but rather an affirmative act. For this reason alone, Idaho case law should distinguish between the two doctrines because they are not the same—they do not impose the same obligation and their violation should not be treated the same.

Three years later, in *Ricketts*, this Court provided additional guidance and explanation. In *Ricketts*, a motorist brought suit after he drove into a trailer with loaded pipe that was stopped on an interstate ramp. *Ricketts*, 137 Idaho at 579-80, 51 P.3d at 393-94. The trailer was stopped in the road because the ball hitch holding the trailer broke. The driver of the truck threw the broken ball hitch into the borrow pit after it had broken and it was lost. *Id.* The motorist brought suit against the owner of the pipe trailer and at trial had requested a spoliation instruction because the defendant, the owner of the truck and trailer, had disposed of the ball hitch. *Id.* at 581-82, 51 P.3d at 395-96. The district court refused to give the instruction because the motorist, the plaintiff, could not show that the defendant had intentionally destroyed the ball hitch. On appeal, this Court affirmed and explained as follows: [E]ven though this Court has not expressly adopted spoliation of evidence in Idaho, it has recognized that spoliation of evidence is a tort. See also *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 177, 923 P.2d 416, 422 (1996). In *Yoakum*, the Court noted that spoliation is its own intentional tort. The Court said that “[t]he guidelines offered by the authors of the Restatement and the cases which have defined the intentional spoliation of evidence cause of action provide a framework for another cause of action based upon intentional conduct that unreasonably interferes with a party’s prospective cause of action. The tort of intentional spoliation of evidence has been alternatively identified by courts as the ‘intentional interference with \*51 prospective civil action by spoliation of evidence.’” *Id.* at 178, 923 P.2d at 423 (citing *Hazen v. Anchorage*, 718 P.2d 456, 463 (Alaska 1986)). The Court also stated that it is closely aligned with the tort of intentional interference with a prospective business advantage. *Idaho First Nat’l Bank v. Bliss Valley Foods*, 121 Idaho 266, 284-87, 824 P.2d 841, 859-62 (1991).

See *Ricketts*, 137 Idaho at 581-82, 51 P.3d at 395-96 (2002). Finding that the doctrine of spoliation was in essence an intentional tort, this Court concluded that, “[t]he concept of spoliation requires a state of mind that shows a plan or premeditation that is not shown in this case” and, consequently, that “[i]t was not error to deny the instructions on spoliation.” *Id.*

And, consistent with *Ricketts*, in *Courtney v. Big O Tires, Inc.*, this Court affirmed the requirement that in order to obtain a “spoliation” instruction a requesting party must show that the destruction of evidence was done in “bad faith.”

Whether or not conduct constitutes an admission depends upon the party’s knowledge or intent that can be inferred from that conduct. For the loss or destruction of evidence to constitute an admission, the circumstances must indicate that the evidence was lost or destroyed because the party responsible for such loss or destruction did not want the evidence available for use by an adverse party in pending or reasonably foreseeable litigation. The merely negligent loss of evidence will not support that inference, nor would the

intentional destruction of an item that a party had no reason to believe had any evidentiary significance at the time it was destroyed.

[Courtney](#), 139 Idaho at 824-25, 87 P.3d at 933-34 (2003). Significantly, Justice Eismann, writing for the Court, recognized the existence of circumstances where the unjustifiable destruction of evidence material to pending or reasonable foreseeable litigation may so prejudice a party as to warrant more significant sanctions:

There may be circumstances, however, where such inference could be drawn from the reckless loss or destruction of evidence. Although the district court erred in instructing the jury that the inference could arise from Big O's negligent loss of the tire, such error was favorable to Mr. Courtney.

**\*52** We are only dealing here with instructing the jury as to the evidentiary significance of a party's conduct in losing or destroying evidence. There may certainly be circumstances where a party's willful, intentional, and unjustifiable destruction of evidence that the party knows is material to pending or reasonably foreseeable litigation may so prejudice an opposing party that sanctions such as those listed in [Rule 37\(b\) of the Idaho Rules of Civil Procedure](#) are appropriate. In addition, nothing herein should be interpreted as limiting counsel's closing argument to the jury.

*Id.* It is significant that the Court recognized the need to consider potential prejudice and a trial court's ability to fashion an appropriate remedy based on both the materiality of the evidence and the prejudiced suffered by the opposing party. However, clearly, the Court solidified the “spoliation as an intentional tort” approach and the requisite element of bad intent.

Here, Spudnik Equipment requests a clarification of the law such that the Court treats spoliation and the duty to preserve as separate doctrines. That extension is proposed as follows--where there has been a breach of the duty to preserve by a plaintiff, and where the offending party new or should have known that the act of omission would result in the loss of evidence material to the litigation and substantial prejudice to the non-offending party, the district court should be provided discretion to fashion an appropriate remedy including those listed in [37\(b\) of the Idaho Rules of Civil Procedure](#). Absent this discretion, plaintiffs like Liberty Northwest Insurance have no incentive to preserve evidence if it is evidence that could be detrimental to their case. This case is a prime example.

Additionally, such discretion is consistent with Idaho law that provides defendants of product liability actions important affirmative defenses. One of those affirmative defenses, of particular importance here, is contributory negligence, sometimes referred to as comparative responsibility. See [Idaho Code § 6-802](#) (“[T]he court shall... reduce the **\*53** amount of such damages in proportion to the amount of negligence or comparative responsibility attributable to the person recovering.”) As set forth in [Section 6-1405](#), use of a product with a known defective condition, misuse of the product, or alteration or modification of a product, is conduct that directly impacts the comparative responsibility of a claimant and, as a result, the liability of the defendant.

Here, all of these issues, defective condition, misuse of the product, alteration and modification, are relevant and as defenses would be available to Spudnik Equipment if it had access to the conveyor system in its condition on the day of Mr. Olmos' accident. That evidence, however, was not preserved and, consequently, those defenses are not available at all or have been greatly diminished. What is particularly troubling here is the fact that the defenses of misuse and alteration/modification were at issue from the very beginning and the insurance company took no affirmative action. The above-cited testimony affirmatively proves that alteration, modification and repair of *used* equipment occurred before and after the accident, and continues to occur. Liberty Northwest Insurance cannot even establish what equipment made up the conveyor system on the day of the accident and makes no attempt to assert any of the farm equipment is in the same condition as it was on the day of the accident or at purchase. Consequently, it is an incontrovertible fact that Liberty Northwest Insurance's failure to preserve has eliminated defenses that should rightfully be available to Spudnik Equipment if the insurance company had fulfilled its duty to preserve.

## 2. Jurisdictions Outside Of Idaho Support An Extension Of District Court Discretion To Address The Present Circumstances

Jurisdictions outside of Idaho apply the recommended approach. First, courts outside of Idaho recognize that experienced litigators such as insurance companies should \*54 be held to a higher standard regarding preservation than a lay person who has no prior litigation experience. “An insurer or other experienced litigant is generally more likely to recognize the potential relevance of evidence and is therefore held to a higher standard regarding preservation than is a lay person who has no prior litigation experience.” See *Powell v. Texvans, Inc.*, 2011 WL 1099120 \*6 (D. Nev. Mar. 22, 2011) (citing *Northern Assur. Co. v. Ware*, 145 F.R.D. 281, 284 (D. Maine 1993); *Workman v. AB Electrolux Corp.*, 2005 WL 1896246, at \*5 (D. Kan. 2005)). Second, non-Idaho courts have also recognized the need to confer discretion to district courts to fashion remedies where the duty to preserve has been breached by a plaintiff and where that breach has resulted in substantial prejudice to the defending party. See *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804, 807 (7th Cir. 1995); *Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Products Co.*, 634 N.E.2d 1319, 1323 (Ill. App. 1994).

In *Allstate*, a home was destroyed by a fire started by a gas grill. 53 F.3d at 805. The insurance company sent a claims adjuster and an engineer to investigate the fire. After the adjuster and the engineer investigated the fire scene but before they had identified the sole cause of the fire, the insurance company determined that the only significant evidence was the remains of the grill's fuel system. *Id.* at 805. Consequently, the insurance company only preserved the grill's fuel system. *Id.* at 806.

Two years after the fire, Allstate Insurance, as subrogee of the homeowners, brought a products liability action against the manufacturer of the grill. *Id.* The plaintiff-insurance company's claims were dismissed however because the insurance company only preserved a portion of the grill, thereby “seriously and materially weaken[ing]” the manufacturer's \*55 ability to proffer a defense. *Id.* at 806 (“Allstate failed to preserve evidence, some of which was part of the alleged defective product itself and some of which was evidence which might itself have been or shed light upon, an alternative cause of the fire.”). The Seventh Circuit affirmed the district court's dismissal concluding that the trial court properly exercised its discretion dismissing the claims against the manufacturer.

In *Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Products Co.*, 634 N.E.2d 1319, 1323 (Ill. App. 1994), a case quoted extensively in *Allstate*, an insurance company also failed to preserve evidence. There, a couple purchased and assembled a gas grill. *Id.* at 1321. After cooking on the grill, located under carport, the husband removed the food and followed the recommended cleaning procedure, turning both burners up to high and closing the lid. *Id.* About ten minutes later, when he checked the grill he observed the grill and his house on fire. *Id.* The insurance company sent an investigator to determine the cause of the fire. The investigator took photographs and disassembled the grill, including the propane tank. *Id.* Again, the insurance company only preserved a portion of the grill. *Id.* As a result, the manufacturer was not in a position to submit alternative theories of causation:

By the inadvertent loss of a portion of the grill, the insurance company effectively foreclosed a possible affirmative defense of what may have been the actual cause of the fire. Sunbeam [the manufacturer] thus lost any opportunity to present affirmative defenses of alternative causes of the fire and was limited by the insurance company's action to merely rebutting [the plaintiff's expert's] opinion. Mere rebuttal of the theory of the insurance company's expert may not be nearly as an effective defense as a presentation to the jury by Sunbeam [the manufacturer] that the fire was actually caused by something other than a defective product. In light of these limitations on Sunbeam's ability to defend itself and a reasonable possibility that the insurance company's acts foreclosed the truth as to the cause of the fire from ever being ascertained, we cannot say that the trial court erred in \*56 barring evidence or testimony about the allegedly defective grill. See *State Farm Fire & Casualty Co.*, 146 F.R.D. 160, *American Family Insurance Co.*, 223 Ill. App.3d 624, 166 Ill.Dec. 93, 585 N.E.2d 1115, *Graves*, 172 Ill.App.3d 35, 122 Ill.Dec. 420, 526 N.E.2d 679, wherein each court found that insurance companies have a duty, which predates the filing of a complaint, to preserve a product which is the basis for a product liability action the subrogating insurance company intends to file.

[Id.](#) at 1324

Just as in *Allstate* and *Shelbyville Mut. Ins. Co.*, the insurer and plaintiff, Liberty Northwest Insurance, failed to preserve the product it claims was defective and has thus effectively foreclosed possible affirmative defenses related to causation of the accident. Like its companion insurance companies, Liberty Northwest Insurance identified only a portion of the system it deemed was defective, one conveyor table. However, here, Liberty Northwest Insurance did not preserve even the portion they claim is defective or that caused the accident. As Mr. Grant testified, Grant 4-D Farms cannot reconstruct the conveyor system and any equipment that may have been involved in the accident has been subsequently used and modified. Indeed, as recognized by the district court there is no evidence showing the one table that was preserved was even one of the tables involved in the accident:

it is unknown whether the identified table formed half of the nip point which injured Olmos, or not. It may have only formed part of the line, without being the point of contact. Liberty's answers to interrogatories describe "5-6 conveyors" involved in the operation on October 9, 2008.

(R., p.537 (Order Granting Spudnik Motion for Summary Judgment, pp.23-24).)

Given Idaho product liability law and the availability of defenses that encompass misuse, modification, alteration and useful safe life, there can be no doubt that Spudnik Equipment has been prejudiced to the point that it cannot fairly defend itself. The insurance \*57 company, an experienced litigator, has caused this prejudice because it indisputably breached its duty to preserve evidence. Under the present state of the law, there is no penalty. An insurance company has no incentive to affirmatively preserve evidence and, given the current standard of the impositions for spoliation sanctions, faces no real consequence if it simply does nothing. Accordingly, this Court should modify existing Idaho law to allow trial courts discretion to enforce what is already recognized in Idaho--a duty to preserve evidence.

## COSTS

Spudnik Equipment asserts that it be award its costs of appeal as a matter of right upon this Court's determination that it is the prevailing party on appeal. [See Idaho Appellate Rule 40.](#)

## CONCLUSION

Spudnik Equipment respectfully requests this Court affirm the district court's order granting summary judgment in favor of Spudnik Equipment. Alternatively, in the event that summary judgment is not affirmed, Spudnik Equipment requests that this Court modify existing Idaho case law and applying that modified law to the facts and found by the district court conclude that Liberty Northwest Insurance's breach of its duty to preserve evidence merits dismissal or another appropriate sanction.

### Footnotes

- 1 Significantly, Mr. Grant's testimony also illustrates the prejudice suffered by Spudnik Equipment resulting from not being able to identify the conveyors. Not knowing the identity of the conveyors makes it impossible for Spudnik Equipment to determine whether there was a Double L conveyor in the line and as a result if the adjustments made to accommodate an "occasional" Double L conveyor contributed to the accident. (*See R.*, p.478 (p.66, Ls.10-14 ("[W]e would occasionally add in a Double L conveyor into a Spudnik line for a brief period. But it required some adjustments on the belting to make it work and then readjusting back when we took it back into the Double L.")). Mr. Olmos was injured reconnecting the conveyors.
- 2 The reliance on Mr. Saucedo's testimony is surprising given that Mr. Saucedo in a subsequent deposition made clear that at the time of the accident he could not tell the difference between conveyors of different manufacturers. (*See R.*, p.501, fn. 3) This subsequent

deposition testimony could not be presented to the district court as the deposition took place just prior to the hearing and is not, therefore, not part of the record. It is, however, a fact that is well-known by the parties and attorneys involved.

3 The insurance company alludes to the fact that Dr. Gill bases his testimony on “the video, the photographs, and the Spudnik manual.” Appellant’s Brief, p.12. However, there is nothing in the record to connect those items to the unidentifiable conveyor system that was involved in the accident.

4 The insurance company also fails to appreciate the fact that to prove design defect or failure to warn under the theory of strict liability it also has the burden of proving: 1) Spudnik Equipment was a “product seller” with respect to the “conveyor system”; 2) the “conveyor system” was in a defective and unreasonably dangerous condition when it left the hands of Spudnik Equipment; and 3) the alleged defective condition was a proximate cause of Mr. Olmos’ injuries. See IDJI 10.04; *Peterson v. Idaho First Nat’l Bank*, 117 Idaho 724, 728, 791 P.2d 1303, 1307 (1990).

Of importance, a “product seller” is not a commercial seller of “used products.” *Id.* Furthermore, as explained in *Peterson*, the insurance company must prove that Spudnik Equipment is a “product seller” selling “used” equipment that was not in “essentially the same condition as when it was acquired for resale.” *Id.* (“[S]trict liability does not extend to the commercial seller of used products who sells the used product ‘in essentially the same condition as when it was acquired for resale.’”). Given the insurance company’s failure to preserve the “conveyor system,” the insurance company again cannot meet its requisite burden. Moreover, with respect to the one identified conveyor, the undisputed testimony affirmatively proves that the conveyor was purchased “as is” and never left Mr. Young’s farm. (R., p.241 (p.69, L.12 - p.71, L.13).) It appears the insurance company is abandoning these claims as the opening brief does not address its strict liability claims individually.

5 Spudnik Equipment appreciates the fact that the insurance company claims that it is entitled to summary judgment and presents that question as an issue on appeal. Clearly, if the insurance company cannot proffer evidence supporting its claims it cannot, as a matter of law, be entitled to summary judgment. Furthermore, as set forth above, there is ample evidence of acts that could be considered the actual cause of the accident as well as other genuine issues of material fact. *Supra* Section I (C)(6). Accordingly, Liberty Northwest Insurance is certainly not entitled to summary judgment.

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